[redacted]

Supreme Court of the United States

[redacted]

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM J. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS,

vs.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER,

vs.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 7, 1933.

CERTIORARI GRANTED OCTOBER 10, 1933.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 43001

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. Frothingham, as Executors of the Estate of Alexander M. White, Plaintiffs,

against

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed May 8, 1935

To the Honorable Judges of the Court of Claims of the United States:

The petition of Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as and only as Executors of the Estate of Alexander M. White, deceased, by Cotton, Franklin, Wright & Gordon, their attorneys, respectfully shows to this Court and alleges:

1. That Alexander M. White died on September 21, 1929, a citizen of the United States and of Oyster Bay, Nassau County, State of New York.

[fol. 2] 2. That on November 11, 1929, the Last Will and Testament of said Alexander M. White, dated September 13, 1928, was duly admitted to probate by the Surrogates' Court of the State of New York, Nassau County, and letters testamentary thereon were issued by said Court to Harold T. White of Bedford, Westchester County, State of New York, Alexander M. White, Jr., Oyster Bay, Nassau County, State of New York, and William I. Frothingham, Glen Cove, Nassau County, State of New York, a certificate of which is attached hereto marked Exhibit "A" and incorporated herein, and that said Harold T. White, Alexander M. White, Jr., and William I. Frothingham duly qualified as Executors of the estate of said decedent and are now acting in that capacity.

3. That petitioners, pursuant to the Revenue Act of 1928 and the Regulations in such cases made and provided, duly filed on or before March 15, 1930 a federal income tax return for Alexander M. White, deceased, for the taxable period from January 1, 1929 to September 21, 1929, report-

ing next taxable income on which a tax of $15,036.89 was computed to be payable.

4. That petitioners caused to be paid by check to the Collector of Internal Revenue for the Second District of New York on account of the tax due on the return as filed for the taxable period January 1, 1929 to September 21, 1929 an aggregate amount of $15,036.89 by making the following installment payments, to wit: $3,759.23 on March 15, 1930, $3,759.22 on June 14, 1930, $3,759.22 on September 15, 1930 [fol. 3] and $3,759.22 on December 15, 1930; photostatic copies of the said checks are attached hereto, marked Exhibits "B", "C", "D" and "E" and incorporated herein.

5. That on October 7, 1931, the Commissioner of Internal Revenue assessed against your petitioners' decedent additional income taxes of $12,509.74 for the taxable period January 1, 1929 to September 21, 1929; that written notice and demand for the payment of said assessment, duly signed by William Duggan as Collector of Internal Revenue for the Second District of New York, was made and served upon your petitioners.

6. That on January 8, 1932, petitioners caused to be paid by check to the Collector of Internal Revenue the further aggregate amount of $13,831.49 on account of the additional assessment of $12,509.74 and interest thereon to the date of payment of $1,321.75, a photostatic copy of which check is attached hereto, marked Exhibit "F" and incorporated herein.

7. That on December 15, 1932, petitioners duly filed in detail and under oath, according to the provisions of law in that regard and the Regulations of the Secretary of the Treasury established in pursuance thereof, their written claim for refund of $13,246.94, or such greater amount as might be legally refundable, on Form 843, based upon their right to deduct under Section 23(e) of the Revenue Act of 1928 a loss of $104,500 sustained on 1100 shares of the Preferred Stock of Del Bay Farms, Incorporated, a full true [fol. 4] and correct copy of which claim is attached hereto, marked Exhibit "G" and incorporated herein.

8. That on May 9, 1933, the Commissioner of Internal Revenue by registered letter rejected said claim for refund, a true and correct copy of which letter is attached hereto, marked Exhibit "H" and incorporated herein, for the rea-

son as set forth in the Treasury Departments' letter dated April 24, 1933, a photostatic copy of which letter is attached hereto, marked Exhibit "I" and incorporated herein, that said loss was a capital loss and therefore deductible under Section 101 of the Revenue Act of 1928.

9. That Alexander M. White, the decedent, from time to time between February 18, 1925 and March 17, 1927, inclusive, purchased for sums aggregating $110,000 certain 7-Year 6% Mortgage Bonds, due December 1, 1931, of Seabrook Co., a corporation incorporated under the laws of the State of New Jersey; that the name of Seabrook Co. was subsequently changed to Del Bay Farms, Inc., that thereafter in 1927 a receiver in equity was appointed for said Del Bay Farms, Inc. (in this paragraph sometimes referred to as the "old company") and said corporation was liquidated; that the holders of said 7-Year 6% Mortgage Bonds purchased at foreclosure sale the corporate properties pledged under the mortgage securing said 7-Year 6% Mortgage Bonds and organized under the laws of the State of Delaware, Del Bay Farms, Incorporated (in this paragraph [fol. 5] sometimes referred to as the "new company") to hold and operate the properties so purchased at foreclosure sale; that Alexander M. White, the decedent, exchanged his 7-Year 6% Mortgage Bonds of the old company for 1,100 shares of Preferred stock of $100 par value per share of the new company; that said exchange was a non-taxable exchange and the cost basis of the 1,100 shares of Preferred stock of the new company was $110,000, to wit, the amount originally paid for the 7-Year 6% Mortgage Bonds of the old company; that the business of Del Bay Farms, Incorporated, the new company, proved unsuccessful; that during the year 1929 Del Bay Farms, Incorporated, the new company, sold its corporate properties, closed its office and ceased its activities; that in complete liquidation Del Bay Farms, Incorporated, the new company, paid a liquidating dividend of $5.00 per share on its outstanding Preferred stock; that on May 9, 1929, Alexander M. White, the decedent, received his proportion of said liquidating dividend amounting to $5,500; that Alexander M. White, the decedent, sustained a loss under Section 23(e) of the Revenue Act of 1928 of $104,500 on his 1,100 shares of Preferred stock of Del Bay Farms, Incorporated, the new company, to wit: the difference between $110,000, the cost basis of said 1,100

shares of Preferred stock, and $5,500 the liquidating dividend received from Del Bay Farms, Incorporated, the new company; that a loss of $104,500 was claimed on account of said transaction in Item 15, of the return filed by your petitioners for the period January 1, 1929 to September 21, 1929.

[fol. 6] 10. That the Commissioner of Internal Revenue has denied petitioners' right to deduct, under Section 23(e) of the Revenue Act of 1928, the loss of $104,500 referred to in paragraph 9 hereof, illegally claiming that said loss constituted a capital loss deductible only to the extent and in the manner provided in Section 101 of the Revenue Act of 1928, and has made the additional assessment referred to in paragraph 5 hereof against the plaintiffs on account of said determination; that the tax paid on account of said determination and additional assessment has been wrongfully, erroneously and illegally assessed and collected from the plaintiffs.

11. Petitioners are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way volunteered, aided, abetted or given encouragement to rebellion against said Government, and that they are the sole and absolute owners of the claim herewith presented; and that they have made no transfer or assignment of said claim or of any parts thereof, and that petitioners are justly entitled to the amounts claimed herein from the United States after allowing all just credits and set offs.

Wherefore, petitioners pray judgment in their favor and against the United States of America for the sum of $13,246.94 with interest at the rate of 6% per annum from January 7th, 1932, together with the cost of this action, and for [fol. 7] such other relief as may to this Honorable Court seem just and proper.

Harold T. White, Executor of the Estate of Alexander M. White. Alexander M. White, Jr., Executor of the Estate of Alexander M. White. Cotton, Franklin, Wright & Gordon, Attorneys for Petitioners. Office and P. O. Address, 63 Wall Street, Borough of Manhattan, City of New York. Charles C. Parlin, John P. Ohl, of Counsel.

[fols. 8-10] *Duly sworn to by Harold T. White, et al. Jurats omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

The People of the State of New York to all to whom these presents shall come or may concern, send Greetings:

Know ye, That we, having inspected the Records of our Surrogate's Court in and for the County of Nassau do find that on the 11th day of November, one thousand nine hundred and twenty-nine, Letters Testamentary of the estate of Alexander M. White, late of the County of Nassau, deceased, were granted by said Court unto Alexander M. White, Jr., Cove Neck, Oyster Bay, N. Y., Harold T. White, Bedford Hills, N. Y., and William I. Frothingham, Glen Cove, N. Y., Executors, named in the last Will and Testament of said deceased, and that said Letters have not been revoked.

In Testimony Whereof, we have caused the seal of the Surrogate's Court of the County of Nassau to be hereunto affixed.

Witness, Hon. Leone D. Howell, Surrogate of our said County of Nassau, at the Surrogate's Office at Mineola, in the said County, this 3rd day of May, in the year one thousand nine hundred and thirty-five.

J. Henry Dreyer, Deputy Clerk of the Surrogate's Court. (L. S.)

[fol. 12] EXHIBIT "B" TO PETITION

No. 29366

New York March 15 1930.

First National Bank

302426

Pay to the order of Collector of Internal Revenue 2nd District New York Thirty seven hundred and fifty nine 23/100 Dollars.

MAR.

$3759 23/100

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Mar 21 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
35 Mar 22 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Mar 15 1930
Received
2nd District, N. Y.

[fol. 13] EXHIBIT "C" TO PETITION

No. 30055

New York June 14th 1930

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York Three thousand seven hundred fifty nine & 22/100 Dollars.

$3759 22/100
14 172

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Jun 14 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
89 Jun 16 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Jun 14 1930
Received
2nd District, N. Y.

[fol. 14] EXHIBIT "D" TO PETITION

No. 30537

New York Sept. 15th 1930

15 189

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York, Three thousand seven hundred fifty nine & 22/100 Dollars.

$3759 22/100

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Sep 15 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
15 Sep 6* 1930

Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Sep 15 1930
Received
2nd District, N. Y.

[fol. 15] EXHIBIT "E" TO PETITION

No. 31144

New York Dec. 15th 1930

15 186

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York, Three thousand seven hundred fifty nine & 22/100 Dollars.

$3759 22/100

W. A. & A. M. White.

2 B
Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

Dec 15, 1930
No Protest

William Duggan, Acting
Collector of Internal Revenue
Custom House, N. Y. City

---

* So on the original; should be "16." Evidently the stamp was not applied with sufficient pressure.

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
25 Dec 16 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Dec 15 1930
Received
2nd District, N. Y.

[fol. 16] EXHIBIT "F" TO PETITION

No. 33194

New York Jany. 6th 1932

9 115

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York, Thirteen thousand eight hundred and thirty one 49/100 Dollars.

$13831 49/100

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Jan 9 1932

William Duggan,
Collector of Internal Revenue
Custom House, N. Y. City

2 B

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
29 Jan 11 193*

*So in the original; should be "1932." Evidently the stamp was not applied with sufficient pressure.

Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Jan 8 1932
Received
2nd District, N. Y.

[fol. 17]
[Ex. "F"]

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June, 1930

EXHIBIT "G" TO PETITION

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

× REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps
ALEXANDER M. WHITE (died September 21, 1929)
CLAIM OF
[Business address]* HAROLD T. WHITE, et al, Executors
[Residence]* c/o W. A. & A. M. White, 40 Wall Street, New York N. Y.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Second District of New York.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1929, to September 21, 1929.
3. Character of assessment or tax INCOME TAX
4. Amount of assessment, $27,546.63 and int. dates of payment $3,759.23 on 3/15/30, $3,759.22 on 6/15/30,
5. [Date stamps were purchased from the Government]* 9/15/30 & 12/15/30; 12,509.74 & 1,321.75 int. on 1/8/32.
6. Amount to be refunded $13,246.94 and int.
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1928, on January 8, 1934.

*[Matter enclosed in brackets, struck out in copy.]

The deponent verily believes that this claim should be allowed for the following reasons:

[fol. 18] I. Statement of Facts.—Between February 18, 1925 and March 17, 1927 inclusive, taxpayer paid $110,000 for $110,000 face value of Seabrook Co. 7-Year 6% Mortgage Bonds due December 1, 1931. The corporation was incorporated in New Jersey and was engaged in a farming and orcharding venture on a large scale. The name of the company was changed to Del Bay Farms, Inc. The corporation went into the hand of a Receiver in Equity and was liquidated. The holders of the Seabrook Co. 7-Year 6% Mortgage Bonds purchased the property covered by the mortgage, on foreclosure sale, and organized a new company, Del Bay Farms Incorporated, (a Delaware corporation) to carry on the business. In this reorganization taxpayer exchanged his $110,000 7-Year 6% Mortgage Bonds of the old company for 1100 shares of Preferred stock ($100 par value each) in the new company. The exchange was nontaxable. Taxpayer's 1100 shares preferred stock had, therefore, a cost basis of $110,000, the amount originally paid for the Seabrook Co. 7-Year 6% Mortgage Bonds.

The reorganized company, Del Bay Farms Incorporated (of Delaware) also proved unsuccessful. In 1929 the enterprise was wound up; its property sold; its activities ended, and its office was closed. A dividend in complete liquidation, amounting to $5 per share, was distributed to preferred stockholders. Taxpayer's portion of this dividend, amounting to $5,500, was received by him on May 9, 1929. At that time it was apparent that he had sustained a loss of $104,500 on the preferred stock, viz., the difference between $110,000, cost basis, and $5,500, liquidating dividend received. Taxpayer's return for the period from January 1st to September 21st, 1929, the day of his death, included this loss of $104,500 in item 15 "Losses by Fire, Storm, etc." among other deductions.

[fol. 19] Taxpayer did not surrender his stock certificates for cancellation at any time, and his Executors are still in possession of them.

II. The Issue: Respective Contentions, and Computations Based Thereon, of the Treasury Department and of Claimant Herein.

The issue is whether the said loss of $104,500 is a "capital" loss within the provision of Section 101 as main-

tained by the Treasury Department, or whether it is an ordinary loss deductible from gross income in arriving at net income, as asserted by claimant.

If the Treasury Department is correct in claiming said loss is a "capital loss," a "capital" net loss results, and the total tax liability for the taxable period is $27,546.63. Against this taxpayer's representatives have paid $15,036.89 in installments, pursuant to the return filed, and an alleged deficiency of $12,509.74 together with interest thereon from March 15, 1930, to December 19, 1931, in the sum of $1,321.75, or a total of $13,831.79, paid January 8, 1932. This constitutes payment in full.

If the claimant's contention is correct, and the said loss is an ordinary loss deductible in arriving at net income, the total tax liability for the taxable period is $15,565.58. Crediting against this $15,036.89 paid pursuant to the return filed, in instalments, leaves a balance of $528.69 in tax, with interest due thereon to date of payment. Claimant's further payment of $13,831.49 on January 8, 1932, was due to the extent of $528.69 tax, and interest thereon from March 15th, 1930, to December 19, 1931, in the amount [fol. 20] of $55.86; the balance of $13,246.94 was illegally collected and constitutes an overpayment, which, together with interest thereon as provided by law, should be refunded to claimant.

This claim is therefore in the amount of $13,246.94 with interest thereon as provided by law.

III. Reasons for Claimant's Contention That Loss of $104,500 on Del Bay Co. Preferred Stock Is An Ordinary Loss:

The claimant contends that under the provisions of the Act of 1928 the loss of $104,500 sustained by taxpayer on the preferred stock is deductible from gross income in arriving at net income subject to tax, and that it is not a "capital" loss under Section 101, for the following reasons:

---

* As herein used, the word "capital" (in quotation marks) refers to the restrictive meaning under Section 101 of the 1928 Act, *e. g.*, "capital" gain, "capital" loss, etc., whereas the word capital (without quotation marks) refers to the ordinary bookkeeping or accounting meaning, *e. g.*, capital transactions.

A. Section 23(e) of the 1928 Act gives taxpayer in unequivocal terms the right to deduct uncompensated losses in determining net income subject to tax. To abridge this right, equally unequivocal words must be found.

B. Section 101, on the facts stated, does not curtail taxpayer's right to deduct his loss under Section 23(e) because there was not here either a sale or exchange.

Section 101(b) describes the person subject to its "capital" net loss provisions as a

*"taxpayer who * * * sustains a capital net loss (as hereinafter defined in this section) * * *"*

The definition of "capital" loss contained in Section 101(c) is

"* * * deductible loss resulting from the *sale or exchange*"

[fol. 21] of "capital" assets, and the excess of such losses over similar gains constitutes a "capital" net loss.

The parenthetical words of the first quotation are new in the 1928 Act. Their obvious meaning is to limit definitions to those contained in Section 101, and they should be given that effect. For that reason "sale or exchange" cannot properly be given other than the ordinary meaning of these words, even though differently defined elsewhere in the Act.

There was in this case no sale or exchange in fact. There was not even a colorable sale or exchange of stock upon liquidation because taxpayer did not surrender his certificates. Section 101(b) can therefore have no application to this case, and taxpayer's right to the deduction under Section 23(e) remains unabridged.

C. It is claimed that Section 115(c) makes the receipt of a dividend in final liquidation a "sale or exchange" within the meaning of Section 101, and therefore Section 101(b) applies with consequent curtailment of taxpayer's right to deduct his loss under Section 23(e). This is not the case for three reasons.

(1) The words of Section 101(b) defining persons subject to that section reject definitions made elsewhere in the Act (see Section 101(b) and Point III B supra).

(2) Section 115(c) does not constitute a "definition" of sale or exchange. The words used are not those of a defini-

tion, but prescribe similarity of treatment only while recognizing that in fact there is no sale or exchange involved:

[fol. 22] "* * * shall be treated as" * * * (though) * * * "in full payment in exchange for the stock."

These words the Department has construed as a "definition" and "for all purposes of the Act," although there is nothing in them, or in their history, to justify such construction (See infra (3)).

(3) Section 115(c) does not purport to abridge the right given by Section 23(e) and its history and words show conclusively a different intention.

(a) It does not purport to limit deduction of losses under Section 23(e). It provides:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock. * * *"

Prima facie this has no bearing on the deduction of uncompensated losses; it gives a method of computing gain or loss and is the one used by taxpayer in this case.

(b) Its history shows the intention was to secure normal tax and surtax on gains derived from liquidation.

Prior to amendment of the 1918 Act (by Section 201(c)) confusion existed as to treatment of liquidating dividends, the Treasury Department distinguishing them from ordinary dividends and subjecting gain therefrom to both normal and surtax, while the Board of Tax Appeals exempted them from normal tax like ordinary dividends.

McCahan v. McCaughan, 59 Fed. (2nd) 3;
Eric A. Pearson v. Commissioner, 16 B. T. A. 1405.

[fol. 25] The Supreme Court decision of Hellmich v. Hellman, 276 U. S. 233 (published as T. D. 4217 VII-2 C. B. p. 238) settled the confusion by holding them subject to both normal and surtax, as was the gain from any capital transaction such as a sale.

Klein Federal Income Taxation, 1929 Edit. Sec. 10:18 (b) pp. 255-256.

It was thought desirable to incorporate this distinction in the statute itself, whence the amendment by a provision

which became Section 115(c) of the 1928 Act. Analogy to a sale or exchange, the most familiar of capital transactions, was the natural method of bringing the idea home to taxpayers.

D. The provisions of Article 625 Treasury Department Regulations 74, insofar as they may, by implication, be construed to compel taxpayer to take his loss upon final liquidation as a "capital" loss where there is in fact no sale or exchange, are in conflict with Section 23(e) and Section 101 of the 1928 Act, and are void. The question of the validity of this article insofar as it permits a taxpayer, optionally, to take gain received upon a final liquidation as "capital" gain, presents an issue not only irrelevant to this claim, but turning upon entirely different considerations.

E. Claimant's interpretation of these sections is in accordance with the accepted canons of statutory construction, which require effect to be given each of the Sections 23(e), 115(c), and 101, and that the result shall be harmonious and in accord with the legislative intent.

[fol. 24] The construction claimed is briefly:

(1) That under Section 23(e) taxpayer may deduct uncompensated losses in computing net income, unless equally specific words in other parts of the Act require different treatment;

(2) That under Section 115(c) the receipt of a dividend in final liquidation is to be treated as a capital (without quotation marks) transaction (i. e. subject to both normal tax and surtax) like a sale; but that receipt of a liquidating dividend is not thereby made ipso facto and for all purposes of the Act a sale or exchange if not in fact such;

(3) That under Section 101 and for the purposes of Section 101 a loss sustained by taxpayer must be treated as a "capital" loss only when it results from a sale or exchange in fact.

On the other hand, the construction which the Department seeks to enforce does not give effect to each of such sections, and causes conflict between them. This construction, as claimant understands it, is briefly:

(1) That Section 115(c) operates to make every receipt of a final liquidating dividend, ipso facto and regardless

of fact, a sale or exchange for all purposes of the Act, although it is not so worded.

(2) That such fictitious sale or exchange may then be imported into Section 101 for the purpose of compelling the taxpayer to establish a "capital" net loss, in spite of the fact that Section 101 by its terms applies only to "capital" net losses,

"• • • *as defined in this section.*"

[fol. 25] (3) No effect is given to the general provision of Section 23 (e) that uncompensated losses may be deducted in computing net income—a controlling provision only to be overcome by equally definite words in other parts of the Act.

Furthermore the Treasury Department's interpretation makes a harsh and inequitable distinction between situations which are essentially the same. To show this, take two hypothetical cases: Suppose this taxpayer (1) had received no liquidating dividend at all; compute his tax and compare it with that payable under the Treasury Department's rule if (2) he had received one cent per share in liquidation.

In the first case he has an ordinary loss of $110,000, deductible in computing net income (Mont S. Echols v. Commissioner, C. C. A. 8th reported in Prentice-Hall Federal Tax Service 1932 Par. 1726), and must pay a tax of $14,300.58. In the second case, although he has received only $11 return on his investment of $110,000, his loss of $109,989 is held a "capital" loss, and the tax resulting is in the amount of $26,860.50!

It does not appear that the difference of $11 in the actual situations supposed, is sufficient to justify the great variance of $12,559.92 in tax payable. A construction tending to such inequitable results should not be adopted unless clearly prescribed by the words of the statute.

The construction sought by claimant, on the other hand, permits adjustment of the tax on the basis of the actual loss sustained; as against a tax of $14,300.58 in the case supposed where no liquidating dividends have been received, the tax would be $14,303.11 where one cent per share had been received in liquidation.

[fol. 26] Even if the words of the statute are ambiguous, which claimant denies, it is well recognized that they are to be construed most favorably to the taxpayer.

IV. This claim is submitted without prejudice to taxpayer's right to submit further evidence of fact, and incorporates by reference the relevant parts of protest filed May 14, 1931, in the U. S. Department of Internal Revenue, Second District of New York, the brief filed June 22, 1931 at the hearing on said protest in the Second District of New York, and the brief filed at the Office of the Commissioner of Internal Revenue, Washington, D. C., September 11, 1931, at the hearing granted on that date before Mr. Chapman.

Dated, New York, N. Y., December 13th, 1932.

Respectfully submitted, (Sgd.) Harold T. White, as Executor of the Estate of Alexander M. White, Deceased. (Sgd.) Alexander M. White, Jr., as Executor of the Estate of Alexander M. White, Deceased. (Sgd.) William I. Forthingham, as Executor of the Estate of Alexander M. White, Deceased.

Sworn to before me this 13th day of December, 1932. Rosa B. Crossman, Notary Public, Queens Co. Queens Co. Clk's. No. 365. N. Y. Co. Clk's. No. 424. Reg. No. 4C246. Comm. Expires March 30, 1934.

[fol. 27] EXHIBIT "H" TO PETITION

Treasury Department, Washington

May 9, 1933.

[Seal]

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:C:CC-4. CCP.

Mr. Harold T. White, Executor, Estate of Alexander M. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York

In Refund Claim for year 1/1-9/21/29—Amount $13,246.94

SIR:

In accordance with the provisions of section 3226, Revised Statutes, as amended, and as further amended by section

1103 of the Revenue Act of 1932, you are hereby notified that your claim for refund of taxes, referred to in Bureau letter of April 24, 1933, was disallowed on a schedule dated May 9 1933.

By direction of the Commissioner.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by T. F. Langley, Head of Division.

[fol. 28] EXHIBIT "I" TO PETITION

Treasury Department, Washington.

Apr. 24, 1933.

[Seal]

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:AR:A-2. ABB.

Mr. Harold T. White, Executor, Estate of Alexander M. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York

SIR:

Reference is made to your claim for refund in the amount of $13,246.94 income taxes of the above-named estate for the taxable year 1929.

Your claim is based upon the following issue:

Whether loss of $104,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.

It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. Article 625 of Regulations 74 provides that any gain to a [fol. 29] shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the amount received exceeded the cost,

would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons, it is proposed to disallow your claim. Official notice of the disallowance will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

A copy of this letter is being forwarded to Mr. Harrison Lillibridge, 40 Wall Street, New York, New York, in accordance with the authority conferred upon him as evidenced by a power of attorney on file in this office.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by H. B. Robinson, Head of Division.

[fol. 30] II. General Traverse—Filed June 17, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

III. Substitution of Attorneys of Record

The petition in this case was filed by Cotton, Franklin, Wright & Gordon, as attorneys of record.

On March 23, 1937, on motion made therefor, and allowed by the court, Wright, Gordon, Zachry & Parlin, were substituted as attorneys of record without prejudice to any lien or interest of the former attorneys.

[fol. 31] In Court of Claims

No. 43002

Harold T. White, Sole Surviving Executor of the Estate of William A. White, Plaintiff,

against

The United States of America, Defendant

IV. Petition—Filed May 8, 1935

To the Honorable Judges of the Court of Claims of the United States:

The petition of Harold T. White, as and only as sole surviving Executor of the Estate of William A. White, de-

ceased, by Cotton, Franklin, Wright & Gordon, his attorneys, respectfully shows to this Court and alleges:

1. That William A. White died on May 6, 1927, a citizen of the United States and a resident of the City of New York, County of Kings, State of New York.

2. That on May 13, 1927, the Last Will and Testament of said William A. White, dated April 15, 1910, was duly admitted to probate by the Surrogate's Court of the State [fol. 32] of New York, Kings County, in Cause No. 3895, and letters testamentary thereon were issued by said Court to Harold T. White of Bedford, Westchester County, State of New York, and Alexander M. White of Oyster Bay, Nassau County, State of New York, a certificate of which order is attached hereto, marked Exhibit "A" and incorporated herein and that said Harold T. White and Alexander M. White duly qualified as Executors of the Estate of said decedent; that subsequent to their appointment as Executors Alexander M. White died on September 21, 1929; and that Harold T. White is now the sole surviving and acting Executor for said decedent.

3. That Harold T. White, as Executor, pursuant to the Revenue Act of 1928 and the Regulations in such cases made and provided, duly filed on or before March 15, 1930, a federal income tax return for the Estate of William A. White for the taxable and calendar year 1929, reporting net taxable income on which a tax of $3,541.11 was computed to be payable.

4. That Harold T. White, as Executor, caused to be paid by check to the Collector of Internal Revenue for the Second District of New York on account of the tax due on the return as filed for the calendar and taxable year 1929 an aggregate amount of $3,541.11 by making the following installment payments, to wit: $885.28 on March 15, 1930, $885.28 on June 14, 1930, $885.27 on September 15, 1930 and $885.28 on December 15, 1930; photostatic copies of the said [fol. 33] checks are attached hereto, marked Exhibits "B", "C", "D" and "E" and incorporated herein.

5. That on December 31, 1931. Harold T. White, as Executor, received from the Treasury Department, a Certificate of Overassessment, Number 1253113 (Schedule No. 44478) allowing a refund of $757.64 and interest thereon of

$43.53, together with a check drawn by the Disbursing Clerk of the Treasury Department for $801.17 on account of said overassessment or overpayment of income tax for the year 1929.

6. That on December 15, 1932, Harold T. White, as Executor, duly filed in detail and under oath according to the provisions of law in that regard and the Regulations of the Secretary of the Treasury established in pursuance thereof his written claim for refund of $446.06 with interest, or such greater amount as might be legally refundable, on Form 843, based on his right to deduct under Section 23(e) of the Revenue Act of 1928 a loss of $22,500 sustained on 500 shares of the Preferred Stock of Del Bay Farms, Incorporated, a full, true and correct copy of which claim is attached hereto, marked Exhibit "F" and incorporated herein.

7. That on May 9, 1933, the Commissioner of Internal Revenue by registered letter rejected said claim for refund, a true and correct copy of which letter is attached hereto marked Exhibit "G" and incorporated herein, for the reason, as set forth in the Treasury Department's letter dated April 24, 1933, a photostatic copy of which letter is [fol. 34] attached hereto, marked Exhibit "H" and incorporated herein, that said loss was a capital loss and therefore deductible under Section 101 of the Revenue Act of 1928.

8. That Harold T. White, as Executor, came into possession of, as part of the general residuary estate of William A. White, $50,000 face value 7-Year 6% Mortgage Bonds due December 1, 1931 of Seabrook Co., a corporation incorporated under the laws of the State of New Jersey; that on May 6, 1927, the date of William A. White's demise, said bonds had a true market value of $25,000; that the cost basis to the Executors of said bonds is $25,000; that the name of Seabrook Co. was changed to Del Bay Farms, Inc.; that thereafter in 1927 a receiver in equity was appointed for said Del Bay Farms, Inc. (in this paragraph sometimes referred to as the "old company") and said corporation was liquidated; that the holders of said 7-Year 6% Mortgage Bonds purchased at foreclosure sale the corporate properties pledged under the mortgage securing said 7-Year 6% Mortgage Bonds and organized under the laws of the

State of Delaware, Del Bay Farms, Incorporated (in this paragraph sometimes referred to as the "new company") to hold and operate the properties so purchased at foreclosure sale; that Harold T. White, as Executor, exchanged said 7-Year 6% Mortgage Bonds of the old company for 500 shares of Preferred Stock of $100 par value per share of the new company; that said exchange was a non-taxable exchange and the cost basis of the 500 shares of Preferred [fol. 35] Stock was $25,000; that the business of Del Bay Farms, Incorporated, the new company, proved unsuccessful; that during the year 1929 Del Bay Farms, Incorporated, the new company, sold its corporate properties, closed its office and ceased its activities; that in complete liquidation Del Bay Farms, Incorporated, the new company, paid a liquidating dividend of $5.00 per share on each share of its outstanding Preferred Stock; that on May 9, 1929 Harold T. White, as Executor, received his portion of said liquidating dividend amounting to $2,500; that the Estate of William A. White sustained a loss under Section 23(e) of the Revenue Act of 1928 of $22,500 on said 500 shares of Preferred Stock of Del Bay Farms, Incorporated, to wit, the difference between $25,000, the cost basis of said 500 shares of Preferred Stock to the Executors, and $2,500, the liquidating dividend received from Del Bay Farms, Incorporated, the new company.

9. That the Commissioner of Internal Revenue has denied petitioner's right to deduct, under Section 23 (e) of the Revenue Act of 1928, the loss of $22,500 referred to in paragraph 8 hereof, illegally claiming that said loss constitutes a capital loss deductible only to the extent and in the manner provided in Section 101 of the Revenue Act of 1928; that as a result of the Commissioner of Internal Revenue determining that said loss constitutes a capital loss a portion of the tax paid, to wit, $446.06, has been wrongfully, erroneously and illegally assessed and collected from the petitioner.

10. Petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the [fol. 36] United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government, and that he is the sole and absolute owner of the claim herewith presented; and that he has made no

transfer or assignment of said claim, or of any parts thereof, and that petitioner is justly entitled to the amounts claimed herein from the United States, after allowing all just credits and set-offs.

Wherefore petitioner prays judgment in his favor and against the United States of America for the sum of $446.06, with interest thereon at the rate of 6% per annum from the date of payment thereof, together with the costs of this action, and for such other relief as may to this Honorable Court seem just and proper.

Harold T. White, as Sole Surviving Executor of the Estate of William A. White. Cotton, Franklin, Wright & Gordon, Attorneys for Petitioner, Office & P. O. Address, 63 Wall Street, Borough of Manhattan, City of New York, N. Y. Charles C. Parlin, John P. Ohl, of Counsel.

[fol. 37] *Duly sworn to by Harold T. White. Jurat omitted in printing.*

[fol. 38] EXHIBIT "A" TO PETITION

No. 307629

The People of the State of New York to all to whom these presents shall come or may concern, send Greeting:

Know ye, That we, have inspected the records of our Surrogate's Court in and for the County of Kings, do find that on the 13th day of May, in the year One thousand nine hundred and twenty-seven by said Court, Letters Testamentary on the estate of William Augustus White, late of the County of Kings, deceased, were granted unto Alexander Moss White and Harold Tredway White the Executors named in the last Will and Testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In Testimony Whereof, we have caused the Seal of the Surrogate's Court of the County of Kings to be hereunto affixed.

Witness, Honorable George Albert Wingate, Surrogate of our said County of Kings, at the Borough of Brooklyn, the 3rd day of May in the year One thousand nine hundred and thirty-five.

Percy T. Stapleton, Clerk of the Surrogate's Court.

[fol. 39] EXHIBIT "B" TO PETITION

No. 29378

New York March 15 1930

First National Bank

Pay to the order of Collector of Internal Revenue 2nd District New York Eight hundred and eighty five 28/100 Dollars.

$885 28/100

310259

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Mar. 15 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
85 Mar. 17 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Mar. 15, 1930
Received
2nd District, N. Y.

[fol. 40] EXHIBIT "C" TO PETITION

No. 30067

New York June 14th 1930

14 172

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District, New York, Eight hundred eighty five & 28/100 Dollars.

$885 28/100

W. A. & A. M. White.

2 B

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Jun. 14 1930

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
89 Jun. 16 1930
Federal Reserve Bank of New York

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

Office of the Collector of
Internal Revenue
Jun. 14 1930
Received
2nd District, N. Y.

Paid
Jun. 16 1930
The First National Bank
of the City of New York

[fol. 41] EXHIBIT "D" TO PETITION

No. 30549

New York Sept. 15th 1930

15 189

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York Eight hundred eighty five & 27/100 Dollars.

$885 27/100

W. A. & A. M. White.

2 B

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Sep. 15 1930

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
15 Sep. 16 1930
Federal Reserve Bank of New York

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

Paid
9.16.30
First National Bank

Office of the Collector of
Internal Revenue
Sep. 15 1930
Received
2nd District, N. Y.

[fol. 42] EXHIBIT "E" TO PETITION

No. 31156

New York Dec. 15th 1930

15 186

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York Eight hundred eighty five & 28/100 Dollars.

$885 28/100

W. A. & A. M. White.

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
25 Dec. 16 1930
Federal Reserve Bank of New York

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Dec. 1930

William Duggan
Acting Collector of Internal Revenue
Custom House, N. Y. City

Paid
12.16.30
First National Bank

Office of the Collector of
Internal Revenue
Dec. 15 1930
Received
2nd District, N. Y.

[fol. 43] Form 843

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June, 1930

EXHIBIT "F" TO PETITION

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the blank below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP

(Date received)

× REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps HAROLD T. WHITE, Sole Surviving Executor under the Will of
[Business address]* WILLIAM A. WHITE, deceased
[Residence]* c/o W. A. & A. M. White, 40 Wall St. New York, N.Y.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Second District, New York.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1929, to December 31, 1929.
3. Character of assessment or tax INCOME TAX
4. Amount of assessment, $_____; dates of payment $3,541.11 paid 3/15/30; 6/15/30; 9/15/30; & 12/15/30. Refund of $757.64 & int. received 12/31/31.
5. [Date stamps were purchased from the Government]*
6. Amount to be refunded $446.06 and int.
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1928, on December 15th, 1932.

*[Matter enclosed in brackets, struck out in copy.]

The deponent verily believes that this claim should be allowed for the following reasons:

[fol. 44] I. Statement of Facts.—Upon the death of William A. White on May 6, 1927, his Executors, of whom claimant is sole survivor, came into possession of $50,000 face value of 7-Year 6% Mortgage Bonds of the Seabrook Co., a corporation engaged in a farming and orcharding venture on a large scale, as part of the general residuary estate. The value of these bonds at the date of testator's death was fixed for Federal Estate Tax purposes at 50% of par, viz., $25,000, which constituted their cost basis in the hands of

the Executors. The name of the company had been changed to Del Bay Farms Inc. (a New Jersey corporation), and in 1927 it went into the hands of a Receiver in Equity and was liquidated. Holders of Seabrook Co. 7-Year 6% Mortgage Bonds purchased the property covered by the mortgage on foreclosure sale, and organized a new company, Del Bay Farms Incorporated (a Delaware corporation) to carry on the business. In this reorganization claimant-executor exchanged the $50,000 bonds of the old company for 500 shares of preferred stock in the new company. The exchange was nontaxable, and the preferred stock therefore had the same cost basis as the original holding at date of testator's death, viz., $25,000.

The reorganized company, Del Bay Farms Incorporated (of Delaware) also proved unsuccessful, and in 1929 the enterprise was wound up, its activities were ended, and its office was closed. A dividend in complete liquidation, amounting to $5 per share, was distributed to preferred stockholders; the common stockholders received nothing. Claimant-executor received the estate's portion of this dividend, amounting to $2,500, on May 9, 1929, two years and three days subsequent to the death of William A. White. No call was made upon the Executor for delivery of the stock certificates for cancellation, and they are still in his [fol. 45] possession. Upon payment of the dividend in complete liquidation, it was apparent that the estate had sustained a loss of $22,500, namely, the difference between $25,000, costs basis of the preferred stock and the $2,500 liquidating dividend received.

The issue here involved relates to the treatment to be accorded this loss under the Revenue Act of 1928.

II. The issue: respective contentions, and computations based thereon, of the Treasury Department and of claimant herein:

The issue is whether the said loss of $22,500 is a "capital" * loss within the provisions of Section 101 as main-

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* As herein used, the word "capital" (in quotation marks) refers to the restrictive meaning under Section 101 of the 1928 Act, e. g., "capital" gain, "capital" loss, etc., whereas the word capital (without quotation marks) refers to the ordinary bookkeeping or accounting meaning, e. g., capital transactions.

tained by the Treasury Department, or whether it is an ordinary loss deductible from gross income in arriving at net income, as asserted by claimant.

If the Treasury Department is correct in claiming said loss is a "capital" loss, a "capital" net loss results, and the total tax liability for the taxable period is $2,783.47. The tax has been adjusted on this basis, so that if the Treasury Department's contention is correct, no further tax is due.

If claimant-executor's contention is correct, and the said loss is an ordinary loss deductible in arriving at net income, the total tax liability for the taxable period is $2,337.41, and a refund of $446.06, together with interest thereon as provided by law, is due and owing claimant-executor.

This claim is therefore in the amount of $446.06 with interest thereon as provided by law.

[fol. 46] III. Reasons for claimant's contention that loss of $22,500 on Del Bay Co. preferred stock is an ordinary loss:

The claimant-executor contends that under the provisions of the Act of 1928 the loss of $22,500 sustained by claimant-executor on the preferred stock is deductible from gross income in arriving at net income subject to tax, and that it is not a "capital" loss under Section 101, for the following reasons:

A. Section 23 (e) of the 1928 Act gives taxpayer in unequivocal terms the right to deduct uncompensated losses in determining net income subject to tax. To abridge this right, equally unequivocal words must be found.

B. Section 101, on the facts stated, does not curtail taxpayer's right to deduct his loss under Section 23 (e) because there was not here either a sale or exchange.

Section 101 (b) describes the person subject to its "capital" net loss provisions as a

"*taxpayer who* * * * *sustains a capital net loss* (*as hereinafter defined in this section*) * * *."

The definition of "capital" loss contained in Section 101 (c) is

"* * * deductible loss resulting from the *sale or exchange*"

of "capital" assets, and the excess of such losses over similar gains constitutes a "capital" net loss.

The parenthetical words of the first quotation are new in the 1928 Act. Their obvious meaning is to limit definitions to those contained in Section 101, and they should be [fol. 47] given that effect. For that reason "sale or exchange" cannot properly be given other than the ordinary meaning of these words, even though differently defined elsewhere in the Act.

There was in this case no sale or exchange in fact. There was not even a colorable exchange of stock upon liquidation because claimant-executor did not surrender his certificates. Section 101 (b) can therefore have no application to this case, and the right to the deduction under Section 23 (e) remains unabridged.

C. It is claimed that Section 115 (c) makes the receipt of a dividend in final liquidation a "sale or exchange" within the meaning of Section 101, and therefore Section 101 (b) applies, with consequent curtailment of taxpayer's right to deduct his loss under Section 23 (e). This is not the case for three reasons:

(1) The words of Section 101 (b) defining persons subject to that section reject definitions made elsewhere in the Act (see Section 101 (b) and Point III B, supra).

(2) Section 115 (c) does not constitute a "definition" of sale or exchange. The words used are not those of a definition, but prescribe similarity of treatment only while recognizing that in fact there is no sale or exchange involved:

"* * * shall be treated as" * * * (though) * * * "in full payment in exchange for the stock."

These words the Department has construed as a "definition" and "for all purposes of the Act," although there [fol. 48] is nothing in them, or in their history, to justify such construction. (See infra (3)).

(3) Section 115 (c) does not purport to abridge the right given by Section 23 (e) and its history and words show conclusively a different intention.

(a) It does not purport to limit deduction of losses under Section 23 (e). It provides:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock * * *."

Prima facie this has no bearing on the deduction of uncompensated losses; it gives a method of computing gain or loss and is the one used by taxpayer in this case.

(b) Its history shows the intention was to secure normal tax and surtax on gains derived from liquidation.

Prior to amendment of the 1918 Act (by Section 201 (c)) confusion existed as to treatment of liquidating dividends, the Treasury Department distinguishing them from ordinary dividends and subjecting gain therefrom to both normal and surtax, while the Board of Tax Appeals exempted them from normal tax like ordinary dividends.

McCahan v. McCaughan, 59 Fed. (2nd) 3;
Eric A. Pearson v. Commissioner, 16 B. T. A. 1405.

The Supreme Court decision of Hellmich v. Hellman, 276 U. S. 233 (published as T. D. 4217 VII-2 C. B. p. 238) settled [fol. 49] the confusion by holding them subject to both normal and surtax, as was the gain from any capital transaction such as a sale.

Klein Federal Income Taxation 1929 Edit. Sec. 10; 18 (b) pp. 255-256.

It was thought desirable to incorporate this distinction in the statute itself, whence the amendment by a provision which became Section 115 (c) of the 1928 Act. Analogy to a sale or exchange, the most familiar of capital transactions, was the natural method of bringing the idea home to taxpayers.

D. The provisions of Article 625 Treasury Department Regulations 74, insofar as they may, by implication, be construed to compel taxpayer to take his loss upon final liquidation as a "capital" loss where there is in fact no sale or exchange, are in conflict with Section 23 (e) and Section 101 of the 1928 Act, and are void. The question of the validity of this article insofar as it permits a taxpayer, optionally, to take gain received upon a final liquidation as "capital" gain, presents an issue not only irrelevant to this claim, but turning upon entirely different considerations.

E. Claimant-executor's interpretation of these sections is in accordance with the accepted canons of statutory construction, which require effect to be given each of the Sections 23 (e), 115 (c), and 101, and that the result shall be harmonious and in accord with the legislative intent.

The construction claimed is briefly:

(1) That under Section 23 (e) taxpayer may deduct uncompensated losses in computing net income, unless equally specific words in other parts of the Act require different [fol. 50] treatment;

(2) That under Section 115 (c) the receipt of a dividend in final liquidation is to be treated as a capital (without quotation marks) transaction (i. e. subject to both normal tax and surtax) like a sale; but that receipt of a liquidating dividend is not thereby made ipso facto and for all purposes of the Act a sale or exchange if not in fact such;

(3) That under Section 101 and for the purposes of Section 101 a loss sustained by taxpayer must be treated as a "capital" loss only when it results from a sale or exchange in fact.

On the other hand, the construction which the Department seeks to enforce does not give effect to each of such sections, and causes conflict between them. This construction, as claimant-executor understands it, is briefly:

(1) That Section 115(c) operates to make every receipt of a final liquidating dividend, ipso facto and regardless of fact, a sale or exchange for all purposes of the Act, although it is not so worded.

(2) That such fictitious sale or exchange may then be imported into Section 101 for the purpose of compelling the taxpayer to establish a "capital" net loss, in spite of the fact that Section 101 by its terms applies only to "capital" net losses

"* * * *as defined in this section.*"

[fol. 51] Furthermore the Treasury Department's interpretation makes a harsh and inequitable distinction between situations which are essentially the same. It is reasonable that a taxpayer who receives one cent per share in liquidation of his investment should reduce his loss correspond-

ingly as compared with a taxpayer who has received nothing in liquidation. This is the effect of the interpretation claimed by claimant-executor herein. But it is unreasonable that owing to a salvage of one cent per share, the whole balance of the loss should be changed in character into a "capital" loss, with its technical limitations and restrictions, unless the words of the statute specifically require it. Since there do not appear to be any words specifically requiring this construction except in the case of a sale or exchange, claimant-executor believes an equitable construction should be preferred.

Even if the words of the statute are ambiguous, which claimant-executor denies, it is well recognized that they are to be construed most favorably to the taxpayer.

IV. This claim is submitted without prejudice to taxpayer's right to submit further evidence of fact, and incorporates by reference the relevant parts of protest filed May 13, 1931, in the U. S. Department of Internal Revenue, Second District of New York, the brief filed June 4, 1931 at the hearing on said protest in the Second District of New York, and the brief filed at the Office of the Commissioner of Internal Revenue, Washington, D. C., September [fol. 52] 11, 1931, at the hearing granted on that date before Mr. Chapman.

Respectfully submitted, (Sgd.) Harold T. White, as Sole Surviving Executor of the Will of William A. White.

Dated New York, N. Y., December 13th, 1932.

Sworn to before me this 13th day of December, 1932. Rosa B. Crossman, Notary Public, Queens Co. Queens Co. Clks. No. 365. N. Y. Co. Clks. No. 424 Reg. No. 46246. Commission Expires March 30, 1934.

[fol. 53] EXHIBIT "G" TO PETITION

Treasury Department, Washington

[Seal] May 9, 1933

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:C:CC-4. CCP.

Mr. Harold T. White, Executor, u/w William A. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York.

In Refund Claim for year 1929—Amount $446.06

SIR:

In accordance with the provisions of section 3226, Revised Statutes, as amended, and as further amended by section 1103 of the Revenue Act of 1932, you are hereby notified that your claim for refund of taxes, referred to in Bureau letter of April 24, 1933, was disallowed on a schedule dated May 9, 1933.

By direction of the Commissioner.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by T. F. Langley, Head of Division.

[fol. 54] EXHIBIT "H" TO PETITION

Treasury Department, Washington

[Seal] April 24, 1933.

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:AR:A-2. ABB.

Mr. Harold T. White, Executor, u/w William A. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York.

SIR:

Reference is made to your claim for refund in the amount of $446.06 income taxes of the above-named estate for the taxable year 1929.

Your claim is based upon the following issue:

Whether loss of $22,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.

It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. [fol. 55] Article 625 of Regulations 74 provides that any gain to a shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the mount received exceeded the cost, would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons it is proposed to disallow your claim. Official notice of the disallowance will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

A copy of this letter is being forwarded to Mr. Harrison Lillibridge, 40 Wall Street, New York, New York, in accordance with the authority conferred upon him as evidenced by a power of attorney on file in this office.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by H. B. Robinson, Head of Division.

[fol. 56] V. General Traverse—Filed June 17, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

VI. Substitution of Attorneys of Record

The petition in this case was filed by Cotton, Franklin, Wright & Gordon, as attorneys of record.

On March 23, 1937, on motion made therefor, and allowed by the court, Wright, Gordon, Zachry & Parlin, were sub-

stituted as attorneys of record without prejudice to any lien or interest of the former attorneys.

VII. Argument and Submission of Cases

On November 2, 1937, the above-named cases were argued and submitted together by Mr. John P. Ohl, for plaintiffs, and by Mr. Daniel F. Hickey, for defendant.

[fol. 57] VIII. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Green, J.**— Filed December 6, 1937

No. 43001

Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White,

v.

The United States

No. 43002

Harold T. White, Sole Surviving Executor of the Estate of William A. White

v.

The United States

Mr. John P. Ohl for plaintiffs. Mr. Charles C. Parlin and Wright, Gordon, Zachry & Parlin were on the briefs.

Mr. Daniel F. Hickey, with whom was Mr. Assistant Attorney General James W. Morris, for defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

These cases having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

1. These two cases have been consolidated for hearing and trial by agreement of counsel. The issues to be determined by the Court are identical in the two cases, the chief

of which is whether the loss for 1929 should be treated as an ordinary loss under section 23(e) of the Revenue Act of 1928 as claimed by plaintiff or as a capital loss under section 101 of the same act as claimed by defendant.

[fol. 58] No. 43001

2. Alexander M. White died on September 21, 1929. He was a resident and citizen of the State of New York. Up to the time of his death he was a member of the brokerage firm of W. A. and A. M. White, a partnership, 14 Wall Street, New York. W. A. White is the William A. White referred to in case No. 43002 and the father of Alexander M. White.

3. On November 11, 1929, the Last Will and Testament of Alexander M. White dated September 13, 1928, was admitted to probate by the Surrogate's Court of the State of New York, Nassau County, and letters testamentary thereon were issued by the Court to Harold T. White, Alexander M. White, Jr., and William I. Frothingham and they duly qualified as executors of the estate of Alexander M. White and are now acting in that capacity.

4. Harold T. White, as executor, on March 15, 1930, filed an income tax return for Alexander M. White, deceased, for the taxable period from January 1, 1929 to September 21, 1929 showing a net income of $96,354.65 and a tax thereon of $15,036.89.

5. The income tax of $15,036.89 was paid to the Collector of Internal Revenue for the Second District of New York as follows:

March 15, 1930	$3,759.23
June 14, 1930	3,759.22
September 15, 1930	3,759.22
December 15, 1930	3,759.22
Total	15,036.89

6. On October 7, 1931, the Commissioner of Internal Revenue notified the estate of Alexander M. White that a redetermination of the tax liability for the taxable period from January 1, 1929, to September 21, 1929, disclosed a deficiency in the income tax amounting to $12,509.74 which was assessed in due course. In redetermining the tax liability the Commissioner treated as capital net loss an item of

$104,500 deducted in the return as uncompensated loss. On January 8, 1932, the tax deficiency of $12,509.74 plus interest in the amount of $1,321.75, or a total of $13,831.49, was [fol. 59] paid to the Collector of Internal Revenue for the Second District of New York.

7. On December 15, 1932, the executors of the estate of Alexander M. White, deceased, filed a claim on form 843 with the Collector of Internal Revenue for the Second District of New York for the refund of $13,246.94 together with interest. This claim is based upon the alleged error by the Commissioner of Internal Revenue in treating as a capital net loss under Section 101 of the Revenue Act of 1928 an item of $104,500.00 deducted in the return as an uncompensated loss under Section 23 (e) of the same act.

8. On May 9, 1933, the Commissioner of Internal Revenue by registered mail notified the executors of the estate of Alexander M. White, deceased, that the claim for refund in the amount of $13,246.94 was disallowed. The reasons for the rejection of the claim are set forth in a letter from the Commissioner of Internal Revenue dated April 24, 1933, the pertinent parts thereof reading as follows:

Reference is made to your claim for refund in the amount of $13,246.94 income taxes of the above-named estate for the taxable year 1929.

Your claim is based upon the following issue:

Whether loss of $104,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.

It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. Article 625 of Regulations 74 provides that any gain to a shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the amount received exceed the cost, would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons, it is proposed to disallow your claim. Official notice of the disallowance will be issued by

registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

[fol. 60] No. 43002

9. William A. White died on May 6, 1927. He was a resident and citizen of the State of New York.

10. On May 13, 1927, the last Will and Testament of William A. White dated April 15, 1910, was admitted to probate by the Surrogate's Court of the State of New York, Kings County, and letters testamentary thereon were issued by the Court to Harold T. White and Alexander M. White. The persons named duly qualified as executors of the estate of William A. White. Alexander M. White died on September 21, 1929, and Harold T. White is now the sole surviving and acting executor of this estate.

11. On March 15, 1930, Harold T. White as executor filed an income tax return for the estate of William A. White for the calendar year 1929 reporting a net income of $53,882.90 and tax thereon of $3,541.11.

12. The tax of $3,541.11 was paid to the Collector of Internal Revenue for the Second District of New York as follows:

March 15, 1930	$885.28
June 14, 1930	885.28
September 15, 1930	885.27
December 15, 1930	885.28
Total	3,541.11

13. On July 28, 1931, the Bureau of Internal Revenue notified Harold T. White, executor of the estate of William A. White, that a redetermination of the tax liability for the calendar year 1929 in connection with the revenue agent's report disclosed an overassessment of $757.64. The bureau's letter stated, however, that the office had sustained the revenue agent in his treatment of a loss of $22,500 on the stock of Del-Bay Farms, Incorporated. This loss was treated by the Commissioner of Internal Revenue as a capital net loss and not an uncompensated loss.

On December 31, 1931, a certificate of overassessment for 1929 was forwarded to the estate of William A. White together with a refund check of $801.17, being the overassessment of $757.64 together with interest thereon of $43.53.

14. On December 15, 1932, Harold T. White, as executor [fol. 61] of the estate of William A. White, filed a claim on form 843 for refund of $446.06 income tax paid for the calendar year 1929 together with interest thereon. This claim was based on the alleged error by the Commissioner of Internal Revenue in treating as a capital net loss under Section 101 of the Revenue Act of 1928 an item of $22,500 deducted in the return for 1929 as an uncompensated loss under Section 23 (e) of the same act.

15. On May 9, 1933, the Commissioner of Internal Revenue, by registered mail, notified the executor of the estate of William A. White, deceased, that the claim for refund in the amount of $446.06 had been disallowed. The reasons for the rejection of the claim are set forth in a letter from the Commissioner of Internal Revenue dated April 24, 1933. This letter, except for the amounts of tax and of loss involved, is the same as the letter set out in finding 8 herein.

Nos. 43001 and 43002

16. The Seabrook Company was incorporated under the laws of the State of New Jersey in July 1920. It operated a large agricultural and horticultural project near Bridgeton, New Jersey.

17. Alexander M. White became financially interested in the operation of the Seabrook Company and ultimately he, his relatives, and associates lost large amounts of money in the project. The business never was successful and it constantly labored under financial difficulties.

18. The Board of Directors of the Seabrook Company at a meeting held on January 26, 1925, voted to proceed with a plan of readjusting the debt of this corporation. Under this plan, which was eventually consummated, 7-year 6% mortgage bonds in the total amount of $450,000.00 were issued. Alexander M. White, between February 18, 1925, and March 17, 1927, paid $110,000 for $110,000 face amount of these bonds. During the same period William A. White paid $50,000 for $50,000 face amount of these bonds. In July 1925 the Seabrook Company's name was changed to Del-Bay Farms, Inc., hereinafter referred to as the New Jersey corporation. Alexander M. White, his relatives, and associates owned the entire issue of these bonds and

[fol. 62] more than a majority of the voting stock of the New Jersey corporation.

19. The fortunes of the New Jersey corporation continued to decline and a plan of reorganization was formulated, at the instigation of Alexander M. White, providing for the incorporation of a new Delaware company to continue the enterprise and to acquire all of the properties of the New Jersey corporation through judicial proceedings for 4,500 shares of the new Delaware company's preferred stock which was to be distributed to the holders of bonds of the New Jersey corporation at the rate of 10 shares per $1,000 bond. The bonds were to be deposited with the firm of W. A. and A. M. White for the purpose of enabling Alexander M. White to carry out the plan.

Pursuant to the plan of re-organization Del-Bay Farms, Incorporated, was incorporated under the laws of the State of Delaware for the purpose of acquiring the properties of the New Jersey corporation.

20. Proper judicial proceedings were instituted and consummated. The holders of all of the $450,000 principal amount of bonds of the New Jersey corporation deposited their bonds on or before June 23, 1927, with the firm of W. A. and A. M. White for the purpose of enabling Alexander M. White to carry out the plan of reorganization.

21. Pursuant to Court decree, all of the properties of the New Jersey corporation were sold at judicial sale on June 28, 1927, which sale was duly confirmed by the Court. All of the mortgaged assets were purchased by Alexander M. White pursuant to the plan heretofore referred to for $410,434.58 subject to certain underlying mortgages totaling $316,000. This bid was satisfied to the extent of $66,999.46 by cash which was applied to expenses taking precedence over the claims of the bondholders, and a small balance thereof going toward making a small distribution to unsecured claim holders. The balance of $343,435.12 of this bid was satisfied by crediting the bonds on their pro rata share of the proceeds of the sale, each $1,000 bond being stamped to indicate payment to the extent of $763.19. Alexander M. White assigned the bid and turned over the stamped bonds to the Delaware corporation and by deed of conveyance dated October 13, 1927, joined in by everyone [fol. 63] in interest and approved by the Court, the proper-

ties were transferred to the Delaware corporation. In consideration of the properties so acquired, the Delaware corporation issued 4,500 shares of its preferred stock and distributed them to the holders of the bonds of the New Jersey corporation at the rate of 10 shares for each $1,000 face amount of such bonds.

22. The unmortgaged assets consisting principally of growing crops were likewise bid in for $14,565.42 in cash and conveyed to the Delaware corporation. After paying expenses and making a small distribution to unsecured creditors, there was no equity for or distribution made to the stockholders of the New Jersey corporation.

There was also issued and distributed to the former holders of bonds of the New Jersey corporation five shares of common stock in the Delaware corporation for each $1,000 face amount of such bonds. Alexander M. White, his relatives, and associates held a majority of the common stock of the Delaware corporation. This stock turned out valueless before December 1928.

23. Alexander M. White received as his part of the distribution made pursuant to the plan of reorganization 1,100 shares of preferred stock of the Delaware corporation for his $110,000 face amount of bonds of the New Jersey corporation. The estate of William A. White received as its part 500 shares of preferred stock in the Delaware corporation for its $50,000 face amount of bonds of the New Jersey corporation.

24. In December 1928 the Delaware corporation, by order of its Board of Directors, entered into an executory contract to sell all of its assets, except its bank balance, and the sale was consummated in February 1929. The Delaware corporation was dissolved on April 11, 1929, its activities ended and its office closed. Following this, a liquidating dividend of $5.00 was paid on each share of preferred stock whereupon such stock became worthless. Alexander M. White received $5,500 on his 1,100 shares of preferred stock and the estate of William A. White received $2,500 on its 500 shares of preferred stock. The stock certificates were never surrendered or transferred and the executors of both estates are still in possession of such certificates.

[fol. 64] No. 43001

25. The difference between $110,000, the cost of the bonds of the New Jersey corporation to Alexander M. White, exchanged for the preferred stock of the Delaware corporation, and the $5,500 received as a liquidating dividend by him on the preferred stock of the Delaware corporation, is $104,500, the loss claimed to be sustained upon the preferred stock.

No. 43002

26. In its estate tax return for the calendar year 1927 the estate of William A. White gave in the value of the $50,000 face amount of the bonds of the New Jersey corporation at $25,000. This value was accepted by the Commissioner of Internal Revenue. The difference between $25,000 and $2,500 received by the estate of William A. White as a liquidating dividend on the preferred stock of the Delaware corporation is $22,500, the loss claimed to be sustained upon the preferred stock.

Conclusion of Law in No. 43001

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover, and it is therefore ordered that their petition be dismissed.

Judgment is rendered against the plaintiffs in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Conclusion of Law No. 43002

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that his petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this [fol. 65] case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

GREEN, Judge, delivered the opinion of the court:

The two suits above entitled are each brought upon claims for refund. In case No. 43001, the recovery of $13,246.94 with interest is asked; in case No. 43002, $446.06 with interest is sought to be recovered. In both cases the recovery is sought on the ground of alleged overpayments of income taxes. The suits are brought by the respective executors of Alexander M. White in No. 43001 and William A. White in No. 43002. Refund claims were duly filed by the testators. In No. 43001, the plaintiffs contend that the Commissioner of Internal Revenue erred in treating as a capital loss on the liquidation of preferred stock an item of $104,500, deducted as an ordinary and uncompensated loss in the income tax return for the year involved. The same contention is made by the executor of William A. White in No. 43002 with regard to a loss of $22,500 sustained on the same liquidation of preferred stock and deducted as an ordinary loss in the tax return. The issue in both cases is whether the action of the Commissioner was correct.

The findings show that sometime prior to March 18, 1927, Alexander M. White [No. 43001] acquired for cash bonds of the Seabrook Company of the face value of $110,000. This corporation operated a large agricultural and horticultural project in New Jersey. In 1925 its name was changed to Del-Bay Farms, Inc., which will hereinafter be referred to as the old or New Jersey corporation.

March 18, 1927, William A. White [No. 43002] also acquired for cash bonds of the same issue in the amount of $50,000 face value.

Alexander M. White, his family, relatives, and associates owned the entire issue of the corporation bonds and a majority of the voting stock of the New Jersey corporation.

The old corporation fell into financial difficulties which led to a plan for reorganization which involved the foreclosure of the bonds upon the property of the old corporation and the acquisition of its property by a new corporation through judicial proceedings. Acting in accordance with [fol. 66] this plan, Alexander M. White, for the bondholders, purchased the properties of the old corporation at a judicial sale made subject to certain prior mortgages. The bonds were applied on the purchase price to the extent of approximately $763.19 per $1,000 and stamped paid to that extent.

The remainder of the purchase price was paid by Alexander M. White who assigned his bid to the newly incorporated Del-Bay Farms, Incorporated, organized in conformity to his plan, and by deed dated October 13, 1927, in which he was joined by all parties in interest, there was conveyed to the new Delaware corporation title to the properties bought in by him at the foreclosure sale.

In consideration of the receipt of the mortgaged assets the new corporation issued preferred stock of which Alexander M. White received as his share of the distribution made to the former holders of mortgage bonds of the New Jersey corporation 1,100 shares. William A. White having deceased, his estate received from the distribution mentioned 500 shares of the preferred stock of the Delaware corporation. There was no equity for or distribution to the stockholders of the old New Jersey corporation.

We need not set out in detail all of the proceedings which are shown by the findings. It is sufficient to say that the parties agree that the new Delaware company sold all of its assets and paid a liquidating dividend of $5 on each share of the preferred stock which thereupon became worthless, resulting in the loss on the bonds of the New Jersey corporation acquired by Alexander M. White in the sum of $104,500 and a similar loss on the bonds acquired by William A. White of $22,500.

The case turns on the construction of sections 101 and 115 of the revenue act of 1928 as applied to capital gains and losses.

Subsections (a) and (b) of section 101, in determining the tax to be levied under (a) upon a capital net gain and under (b) in case of a capital net loss, provide that the tax shall be determined upon the capital net gain (or capital net loss) "as hereinafter defined in this section," and under "definitions" subdivision (c) (2) states that—

"Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

[fol. 67] It is argued on behalf of plaintiff in each of the cases now before us that there was no "sale or exchange of capital assets." In the ordinary sense of the terms there was not, but section 115 provides with reference to distributions by corporations in subdivision (c)—

(c) Distributions in liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated

as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock.

We think the two sections should be considered together, and when so construed we find that the statute first defines a capital net loss as resulting from the sale or exchange of capital assets, and later provides that amounts distributed in complete or partial liquidation shall be treated as made in exchange for the stock. The provisions of section 115 make a liquidating dividend have the same effect as a sale or exchange of property. This is the rule implied in Article 625 of Regulations 74 which plaintiffs contend is void but which under the view that we have stated above is valid. In this connection it will be noted that section 201(c) of the revenue acts of 1924 and 1926 is identical with section 115(c) of the act of 1928 with respect to the matters now being considered. Congress would seem to have approved the Commissioner's interpretation of the provisions of the 1924 and 1926 acts by reenacting them in the 1928 act.

A number of cases have been cited by counsel for plaintiff in support of their contention that there was no sale or exchange in either of the instant cases. We think, however, that nothing contained therein has any application except in the case of William C. Rands v. Commissioner, 34 B. T. A. 1107, but the decision therein has been overruled by the case of Mary S. Childs v. Commissioner, 35 B. T. A. 1125. The case last cited supports the application of the statute as we have construed it.

What we have said above makes it unnecessary to consider the other objections made by defendant to the claim [fol. 68] sued upon in No. 43002, and it follows that the petition in each of the cases under consideration must be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 69] IX. JUDGMENT IN No. 43001

At a Court of Claims held in the City of Washington on the 6th day of December, A. D., 1937, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiffs are not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiffs' petition be and the same is hereby dismissed.

X. Judgment in No. 43002

At a Court of Claims held in the City of Washington on the 6th day of December, A. D., 1937, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

XI. Proceedings After Entry of Judgment

On February 4, 1938, the plaintiffs filed motions for new trial in both cases.

On March 7, 1938, the court entered the following order on said motions:

Order.

It is Ordered this 7th day of March, 1938, that the plaintiffs' motions for new trial be and the same are overruled.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File Nos. 42,581, 42,582. Court of Claims. Term No. 96. Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White, petitioners, vs. The United States. Term No. 97. Harold T. White, Sole Surviving Executor of the Estate of William A. White, petitioner, vs. The United States. Petition for writs of certiorari and exhibit thereto. Filed June 7, 1938. Term Nos. 96, O. T., 1938, 97, O. T., 1938.

[fol. 71] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 96

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 72] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 97

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.